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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re S.V. et al., Persons Coming Under the Juvenile Court Law.	B221464 (Los Angeles County Super. Ct. No. CK46761)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KIMBERLY V. et al., Defendants and Appellants.	

APPEALS from orders of the Superior Court of Los Angeles County. Marilyn Mackel, Juvenile Court Referee. Affirmed.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant Kimberly V.

Nancy Rabin Brucker, under appointment by the Court of Appeal, for Defendant and Appellant Thomas J.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

In this consolidated appeal, Kimberly (Mother) and Thomas (Father) appeal from the order terminating parental rights to their son (born in 2001) and their daughter (born in 2000), thus freeing the children for adoption by the maternal grandparents. We find that the juvenile court's termination of parental rights was supported by substantial evidence, and that the court did not abuse its discretion in denying Father's petitions for modification. (Welf. & Inst. Code, § 388.)[1]

FACTUAL AND PROCEDURAL SUMMARY

The Los Angeles County Department of Children and Family Services (DCFS) has been involved with this family since approximately May of 2000, when the oldest child was born suffering from prenatal exposure to cocaine. Prior to the dependency petitions in the present case, there were two periods of voluntary services and a previous dependency court case. Mother has an extensive history of drug abuse and domestic violence involving Father, who also has a history of illegal drug use.

In 2005, the children's maternal grandparents were so concerned about recurring methamphetamine usage by both Mother and Father that they attempted to intervene, by assisting Mother and referring the matter to DCFS out of concern for the safety of the children. In March of 2008, Mother agreed to a third voluntary plan and obtained a permanent restraining order against Father. Mother alleged that Father had "laid his hands" on her and threatened her, once with a baseball bat and once with a large pair of pruning shears.

Soon thereafter, a DCFS social worker visited the home unannounced and found Father in Mother's home, despite the restraining order. Father refused to submit to an on-demand drug test. Then, an emergency team decision-making meeting ensued at the DCFS office. Mother also stated that she feared for her safety because Father continued to use drugs. Nonetheless, Mother asked if it was possible to rescind the restraining order

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[1] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

against Father. Mother also admitted she still used marijuana, but asserted that it did not interfere with her parenting.

Mother and Father had never married but had been together approximately 13 years. Father had a criminal history, which included convictions for the infliction of corporal injury on a spouse, contempt of court, receiving stolen property, and driving with a suspended license. In a May 2008 report, the social worker expressed concern over Mother's minimizing the domestic violence situation, because Mother's son had stated that just the prior month Father hit Mother with his closed fist, pushed her to the ground in the child's presence, and regularly slapped and pushed Mother. The social worker was also concerned that Mother had allowed Father back into the house after it had been necessary to obtain a restraining order against him.

In April of 2008, DCFS filed a dependency petition (§ 300) on behalf of the two children. Initially, the children were left in Mother's care. However, she continued to use drugs and continued to allow Father in the home. In May of 2008, an amended dependency petition was filed, and the children were placed with the maternal grandparents, where they currently reside.

In July of 2008, Father was again arrested and briefly incarcerated. Several days later, a mediated agreement was reached in the present dependency matter regarding jurisdiction and disposition. The juvenile court sustained the petition under section 300, subdivision (b), based on the domestic violence between Mother and Father, the parents' violation of the permanent restraining order by having Father live at home, the Mother's unresolved substance abuse problem, as evidenced by recent positive drug tests, and Father's unresolved drug abuse problems and current use of drugs. Also pursuant to the terms of the mediated agreement, Mother and Father were required to participate in a parenting program, group domestic violence counseling, random drug testing, and a substance abuse program (if drug testing was not satisfactory).

Approximately a year and half later, little had changed. In December of 2009, a contested section 366.26 hearing ensued. The juvenile court acknowledged that the case was unusual because the parents had articulated a relationship with the children that was

"grossly inconsistent with their behavior" and a "gross denial" of the nature of their relationship and the harm it caused the children, thus revealing the parents' inability to carry out their intentions. The court terminated parental rights and designated the grandparents as the prospective adoptive parents of the children. The grandparents stated, as well as demonstrated by their actions, that they would continue to allow contact between the children and Mother and Father, as long as it did not pose a threat to the safety of the children.

Mother and Father appeal, contesting the order terminating parental rights. Father also contends the juvenile court should not have denied his section 388 petitions, which requested additional reunification services and asserted that Father had been visiting the children, had completed a 12-session batterer's program, and had drug tested negative for three months.

DISCUSSION

I. Substantial evidence supports the juvenile court's order terminating parental rights.

On appeal following termination of parental rights, we determine if there is any substantial evidence to support the conclusions of the juvenile court. All evidentiary conflicts are resolved in favor of the prevailing party, and all legitimate inferences are drawn to uphold the lower court's ruling. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 774.)

At the section 366.26 selection and implementation hearing, the juvenile court must select adoption as the permanent plan and terminate parental rights, if it finds that the child is likely to be adopted. (§ 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 49.) If the child is likely to be adopted, adoption is the plan preferred by the Legislature. (*In re Edward R.* (1993) 12 Cal.App.4th 116, 122; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) Here, Mother and Father do not contest that the children are, in fact, likely to be adopted. Indeed, the maternal grandparents want to adopt both children.

Thus, unless an exception to the termination of parental rights applies, adoption must be the permanent plan.

Mother and Father seek to avoid termination of parental rights by urging that it would be detrimental to the children (see *In re Celine R., supra,* 31 Cal.4th at p. 53), because Mother and Father "maintained regular visitation and contact" with the children, and the children purportedly "would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Mother and Father bear the burden of showing that the statutory exception applies, and that termination of parental rights would be detrimental to the children. (*In re Derek W., supra,* 73 Cal.App.4th at p. 826; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)

In the present case, Mother and Father failed to meet their burden to show that the relationship with the children was such an extraordinary case that it warranted preservation of their parental rights. Mother and Father were late for most of their visits with the children, and the visits never became unmonitored or more regular than once a week. Although the parents did visit and a relationship did exist with the children, that did not establish that the termination of parental rights would be detrimental to the children.

Mother and Father both focus on an October 7, 2009, social worker's report and claim that both of the children would require counseling to address their issues with grief over the separation and loss of their parents. Mother and Father make this claim based on one line in the report stating that the children "initially hoped to reunify with [them] and are expected to have separation, grief, and loss issues."

However, when viewed in its proper context, it is apparent that the social worker's statement referred not to the negative impact of the termination of parental rights, but rather to what had already occurred—i.e., that Mother and Father had gravely disappointed the children by failing to reunify with them. In fact, the social worker's report further stated that now that the children knew they would be adopted, the children expressed relief at finally knowing what was going to happen. This interpretation is

further supported by the children's attorney, who twice urged the court not to leave the children in the limbo of legal guardianship.

The relief the children expressed when told that the case was moving toward adoption was understandable. The children had been through significant trauma due to domestic violence. They saw Father hit Mother and push her to the ground. They saw Father threaten Mother with a baseball bat and hold a gun to her head. After the gun incident, the children were so upset, they stayed with their grandparents for several days. The son was terrified Father would shoot Mother, and the daughter tried to comfort him by telling him the gun was just a BB gun. The anxiety suffered by the children was such that the son (at age eight) still suffered from encopresis and enuresis, the daughter was on medication, and both children attended regular therapy sessions.

Although counsel for the children acknowledged that the children understandably loved Mother and Father and would like to be with them, counsel explained that, of course, "they are nine and 10 years old." It is only where "severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, [that] the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) That is not the case here. Starting in 2000, the children had been removed from Mother and Father's care several times as part of two voluntary services plans and another court case. For a while, one child resided with the grandfather and the other child had been in foster care. Since May of 2008, (1) Father's visits remained monitored because he had failed to participate in domestic violence counseling, and (2) Mother had visited the children only once a week for three hours and had done so while monitored.

To satisfy the statutory exception to the termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)), Mother and Father must establish the existence of a parent-child relationship that promotes the well-being of the children to such a degree as to "'outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) "The juvenile court

may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

In the present case, the grandparents have provided the children with a stable, loving, and nurturing home. They previously intervened to protect the children and have been involved with the children throughout their lives. The grandparents have paid for private schooling for the children, who are progressing well in school. They attend church weekly, and the children are in a comfortable and stable home. The children did not suffer ill effects when Mother and Father were late or inconsistent in their visits. Significantly, the grandparents have no intention of severing contact between Mother and Father and the children. Mother acknowledged that she had no reason to believe the grandparents would eliminate her from the children's lives, further supporting the finding of lack of detriment in severing parental rights. (See *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1801.)

Moreover, the relationship of both Mother and Father with the children has not been that of a parent-child relationship for approximately two years. And, because Mother and Father failed to comply with the case plan during the reunification period, their visits were never increased and never became unmonitored. During visits with the children, Mother and Father played with puppies, had meals with the grandparents, watched television, and played games. Father mostly watched television and had to be prompted to spend quality time with the children. Mother sometimes tucked the children into bed or cut or combed her daughter's hair, but this occurred, at most, once a week.

Thus, although there was no doubt of some "incidental benefit" to the children in continuing the relationship (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575), Mother and Father failed to establish that they were involved with the actual parenting of the children beyond some limited friendly activities. Nor could Mother and Father establish that their contact with the children rose to the level needed to outweigh the benefits the children will likely accrue from adoption by the grandparents.

Accordingly, the juvenile court's order terminating parental rights is supported by substantial evidence and must be upheld. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) Balancing Mother and Father's arguably friendly—but not parental—relationship with the children against the security of a permanent and stable home with the maternal grandparents, the legislative preference for adoption properly applies here.

II. The juvenile court did not abuse its broad discretion in denying Father's section 388 petitions.

On December 2, 2009 (the same day the contested section 366.26 hearing commenced), Father filed a section 388 petition, seeking to reinstate reunification services, to take the section 366.26 hearing off the calendar, and to liberalize Father's visits and make them unmonitored. The section 388 petition asserted that Father had been visiting the children, had completed a 12-session batterer's program, and had drug tested negative for three months. After a recess, the juvenile court denied the petition and proceeded with the section 366.26 hearing. The court indicated there was "white out" on the progress report from the domestic batterer's program, and the court was suspicious that the document had been "manipulated." However, it denied the petition because the request "does not state new evidence or a change of circumstances," and the proposed change did "not promote the best interest of the child[ren]."

On December 17, 2009, Father filed a second section 388 petition, which was identical to the first petition, except it included a declaration from the director of the Inglewood Batterer's Treatment Program, signed on December 16, asserting the legitimacy of prior documentation regarding Father's attendance and participation in the program. The juvenile court denied the petition for the same reasons that it had denied the prior similar petition. Additionally, it noted that a 12-week program was not the order of the court, and that Father's compliance was minimal at best.

A parent may petition the juvenile court for a hearing to "change, modify, or set aside any order of court previously made" upon the grounds of "change of circumstance or new evidence." (§ 388, subd. (a).) Section 388 further provides: "If it appears that

the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held." (§ 388, subd. (d).)

If the parent's section 388 petition "fails to demonstrate that the requested modification would promote the best interest of the child," the juvenile court may deny the petition ex parte. (Cal. Rules of Court, rule 5.570(d)(2); see *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) Also, if the petition fails to state "a change of circumstance or new evidence that may require a change of order or termination of jurisdiction," it may deny the petition ex parte. (Cal. Rules of Court, rule 5.570(d)(1); see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) The prima facie requirement for a hearing is not met unless the facts alleged, if supported by evidence given credit at a hearing, would sustain a favorable decision on the petition. (See *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

An order denying a hearing on a section 388 petition is reviewed for abuse of discretion. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Here, the juvenile court acted well within the bounds of reason in rejecting Father's petition.

In support of his section 388 petitions, Father provided a copy of a certificate, which showed that during a five-month period he had attended 12 sessions at a domestic violence batterer's program. On that certificate the director checked a box next to a printed statement that Father's participation was "satisfactory," and that no further participation was recommended. However, the director did not indicate why Father did not need further sessions. The form did indicate that 12 sessions were "ordered," but this was not explained. The form also noted "# of sessions: 52," perhaps indicating the length of the full program, had Father completed it.

We find it was reasonable to deem Father's participation lacking. Father did not even start the domestic violence batterer's program until late June of 2009, 14 months into the current case and just before the juvenile court terminated Father's reunification services. It also took Father 23 weeks to attend 12 sessions. It was not an abuse of the juvenile court's broad discretion to essentially deem Father's short and minimal compliance as too little, too late.

Nor would the reinstatement of reunification services and the delay sought by Father be in the best interests of the children. "The presumption that arises after termination of reunification services is . . . that continued care [by the prospective adoptive couple] is in the best interest of the child. The parent, however, may rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Father simply did not rebut the presumption that the children should remain in their grandparents' care, or counter the conclusion that no further reunification services were warranted. Father failed to establish "a legitimate change of circumstances" sufficient to thwart the children's "need for prompt resolution of [their] custody status." (*Id.* at p. 309.)

Accordingly, the juvenile court did not abuse its discretion in denying Father's section 388 petitions.

DISPOSITION

The orders are affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J. ASHMANN-GERST, J.